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### Bodily Evidence and Rule 312, M.R.E.

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- United States v. Carter*, 1 M.J. 318 (C.M.A. 1976). But see Army Reg. No. 600-20, *Personnel-General Army Command Policy and Procedure*, para. 3-4 (28 April 1971).
- <sup>28</sup> Mil. R. Evid. 315(d)(1).
- <sup>29</sup> Current procedure only allows the Navy, Coast Guard and Marine Corps to employ this methodology.
- <sup>31</sup> 6 M.J. 307 (C.M.A. 1979). But see *United States v. Powell*, 8 M.J. 260 (C.M.A. 1980).
- <sup>32</sup> *Id.* at 319.
- <sup>33</sup> *Id.* But see *United States v. Powell*, 8 M.J. 260 (C.M.A. 1980).
- <sup>34</sup> *United States v. Carter*, 1 M.J. 318 (C.M.A. 1976).
- <sup>35</sup> Mil. R. Evid. 315(d)(2).
- <sup>36</sup> Compare *Aguilar v. Texas*, 378 U.S. 108 (1964), and MCM, 1969, para. 152, with Mil. R. Evid. 315(f)(1) & (2).
- <sup>37</sup> See Army Reg. No. 27-10, *Legal Services Military Justice*, para. 14-6 (November 1968).
- <sup>38</sup> Mil. R. Evid. 315(h)(1).
- <sup>39</sup> Mil. R. Evid. 315(h)(2).
- <sup>40</sup> Mil. R. Evid. 315(h)(3).
- <sup>41</sup> See *United States v. Reagan*, 7 M.J. 490 (C.M.A. 1979) (no authority within N.A.T.O. Agreement to permit search of accused's car). Cf. *United States v. Dillard*, 8 M.J. 213 (C.M.A. 1980) (search conducted in violation of army regulation results in exclusion).
- <sup>42</sup> 403 U.S. 443 (1971).
- <sup>43</sup> See e.g., *United States v. Thomas*, 36 C.M.R. 462 (C.M.A. 1966); *United States v. Mossbauer*, 44 C.M.R. 14 (C.M.A. 1971).
- <sup>44</sup> See *United States v. Liberti*, 26 CrL 2441 (1980); *United States v. Hare*, 589 F.2d 1291 (6th Cir. 1979).
- <sup>45</sup> Mil. R. Evid. 316(d)(4)(C).
- <sup>46</sup> Mil. R. Evid. 316(b).
- <sup>47</sup> 49 L.Ed.2d 733 (1979).
- <sup>48</sup> Quaere: What result would follow under the Military Rules of Evidence if there was not a fourth amendment violation, but a 'due process' violation couched in terms of the fifth amendment?
- <sup>49</sup> But see, Army Reg. No. 190-53, *Interception of Wire and Oral Communications for Law Enforcement Purposes*, para. 2-2a(9)(a) (1 November 1978) and *United States v. Dillard*, 8 M.J. 213 (C.M.A. 1980).

## Bodily Evidence and Rule 312, M.R.E.

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### Introduction

*CID is calling from the Post hospital. A drug deal gone awry has left the seller in critical condition with a bullet lodged in his back. The two unidentified male caucasian buyers fled the scene with a small packet of heroin. One probably received a bullet wound from the seller's gun as he fled. Shortly afterwards an MP patrol stopped a weaving car occupied by two male caucasians matching the description of the "buyers". The driver appeared to be intoxicated, the passenger had a bullet wound in his shoulder. The MP's effected a lawful apprehension, called the CID, and proceeded to the hospital. CID wants to know what they must do to get the two bullets, a blood test on the*

*driver, and the heroin which is possibly secreted in the passenger's rectum.*

Although in its composite form the foregoing problem is not common, the individual questions of lawful seizure and admissibility of each piece of evidence do arise with great frequency. The answers to the questions raised should be examined in the light of three controlling principles which potentially apply in any case involving bodily evidence:

- (1) The right against self-incrimination;
- (2) fourth amendment protections; and
- (3) due process considerations.

This article addresses those principles and the

impact of Rule 312, Bodily Views, and Intrusions, Military Rules of Evidence<sup>1</sup> on their application. We turn first to the potential question, or principle, of the applicability of the right against self-incrimination.

### Self-incrimination Considerations

Does an individual have a right to refuse to present bodily evidence on the rationale that it will violate his right against self-incrimination? The civilian courts, considering the fifth amendment protection, say, "no." The right only protects compelled testimonial communications. The Supreme Court has for example rejected self-incrimination arguments where blood was taken from the suspect.<sup>2</sup> However, different results may emerge in the military setting where a service member gains the broad coverage of Article 31, U.C.M.J. Although a service member may not stand behind the right against self-incrimination when asked to provide external body evidence such as tatoos, scars, hair, and teeth impressions,<sup>3</sup> he may properly invoke the right when asked to provide bodily fluids such as blood, semen, or urine.<sup>4</sup>

If the sought evidence is a foreign object located in the body, protection of Article 31 may be available depending on the manner of obtaining it. An order to a suspect to extract an object from a body cavity would probably be protected under the verbal acts doctrine—turning over the evidence would constitute an incriminating "statement".<sup>5</sup> Letting nature run its course or removal by another would more than likely avoid the issue of self-incrimination.<sup>6</sup> Although the law here is always in a state of flux, it seems safe to conclude that bodily fluids or other internal bodily evidence voluntarily submitted by the suspect after proper warnings and waiver would overcome self-incrimination arguments.<sup>7</sup> If the evidence was obtained under compulsion, then self-incrimination problems may also fade if the individual suffers no criminal consequence.<sup>8</sup> The Military Rules of Evidence do not change the military's broader application of the right against self-incrimination. Provision is made, however, in Rule 305 that right to counsel

warnings need be given only when testimonial communications are sought.<sup>9</sup>

Applying these general principles to the facts presented in the introduction, do any of the actors have a right to refuse to provide the sought evidence on grounds of self-incrimination? Retrieving the bullets should not present a self-incrimination problem. Although the wounded seller and wounded passenger are suspects and entitled to rights warnings before being questioned,<sup>10</sup> compelling them to submit to surgical removal, whether major or minor, should not raise self-incrimination problems. Different results occur, however, with regard to the blood sample and the heroin. Simply ordering the suspects to provide the evidence clearly raises self-incrimination problems. The CID may obtain the evidence either through voluntary relinquishment or through compulsion accompanied by immunity from use of the incriminating evidence.<sup>11</sup>

The second potential principle to be addressed is application of fourth amendment guidelines. Here, the Military Rules of Evidence do specifically make major changes and may ultimately resolve some of the potential self-incrimination problems arising in cases where bodily evidence is in issue.

### Fourth Amendment Considerations: Rule 312

Clearly, right to privacy considerations, the core of the fourth amendment, are present in cases where the government is searching or seizing evidence from an individual's person. The civilian and military courts in addressing the applicability of the fourth amendment generally apply a sliding scale analysis approach to bodily evidence questions. The inquiry centers on the degree of intrusion. At one end of the spectrum lie those cases involving only visual examination of the body.<sup>12</sup> At the other lie surgical intrusions for the purposes of obtaining incriminating evidence. Implicit throughout the analysis is a balancing of the government's and individual's interests.<sup>13</sup>

The 1969 *Manual for Courts-Martial* provision on bodily evidence was included in the

discussion on search and seizure and allowed for intrusions under certain circumstances.<sup>14</sup> Rule 312 of the new rules of evidence specifically addresses the fourth amendment issues and generally follows (as will the next section) the sliding-scale tact employed by the courts.

#### **Visual Examination of the Body: Rule 312(b)**

Under Rule 312(b) visual examination of the body may be conducted with the consent of the individual.<sup>15</sup> It may be conducted without consent if done in a reasonable manner and under one of several authorized procedures:

- (1) Inspection or inventory;<sup>16</sup>
- (2) Border search or its military equivalent if there is a real suspicion that weapons, contraband or evidence of a crime are concealed on the individual;<sup>17</sup>
- (3) Jail search;<sup>18</sup>
- (4) Search incident to apprehension;<sup>19</sup>
- (5) Emergency search;<sup>20</sup> or
- (6) Probable cause search.<sup>21</sup>

An authorized involuntary examination of the body may include visual examination of body cavities. The rule urges use of a member of same sex as the individual when conducting the examination but failure to do so does not render any seized evidence inadmissible.<sup>22</sup> The rule appears to follow what civilian law exists on the subject. The greater amount of litigation has centered on what are typically characterized as "strip searches" at borders to the United States<sup>23</sup> or pursuant to prison searches.<sup>24</sup> This rule, however, clearly links nonconsensual bodily inspections or viewing with other valid searches and thus places parameters on what has proved to be a delicate topic in some civilian jurisdictions. So much for the superficial examination of the body human; actual intrusion into a body cavity to retrieve the evidence is covered in Rule 312(c).

#### **Intrusion Into Body Cavities: Rule 312(c)**

Rule 312(c) separates body cavities into two categories. The first category is comprised of

the "mouth, nose, and ears." The second includes "other body cavities." Reasonable non-consensual physical intrusion into the first category is allowed whenever a visual inspection of the body is allowed. For example, to seize a piece of evidence secreted in the individual's mouth, the law enforcement officials must either (1) obtain the individual's consent or (2) proceed under one of the listed authorized searches in Rule 312(b) (2).<sup>25</sup>

Different rules apply to intrusions into the second category of body cavities. Although not specifically addressed, consensual intrusions apparently require no special consideration other than the reasonableness of the intrusion.<sup>26</sup> Nonconsensual intrusions are further categorized into those involving "seizures"<sup>27</sup> and those involving "searches."<sup>28</sup>

A "search" for weapons, contraband, or evidence must be conducted by an individual with "appropriate medical qualifications"<sup>29</sup> and only after first obtaining authorization under Rule 315 which details the requirements for a probable cause search.<sup>30</sup> A "reasonable" non-consensual "seizure" of contraband, evidence or weapons spotted during a lawful visual inspection or pursuant to a "plain view" must be conducted by a person with appropriate medical qualifications.<sup>31</sup> For example, if law enforcement personnel discover seizable contraband in an individual's rectum or vagina during a properly conducted visual examination or pursuant to a plain view observation, they should request the assistance of medical personnel to actually extract the contraband.<sup>32</sup> If they have not seen but have probable cause to believe that the contraband is secreted in the rectum or vagina they should proceed to obtain proper authorization and then use medical personnel to actually conduct the search. Note that the rule provides that if the search is being conducted in a jail or similar facility, it may be based on "real suspicion that weapons, contraband, or evidence are being concealed on the individual," and may be conducted without prior authorization.<sup>33</sup>

**Seizing Bodily Fluids: Rule 312(d)**

As in the rule's provision covering intrusion into body cavities, no specific provision is made in 312(d) for consensual seizure of bodily fluids. Arguably such a voluntary relinquishment of fluids would be permissible.<sup>34</sup> The rule does specifically address nonconsensual seizures of bodily fluids such as blood and urine.

If the seizure is nonconsensual, the authorities must obtain either a search warrant or a search authorization. An exception to this requirement may exist if "there is a clear indication that evidence of crime will be found" and delay resulting from obtaining the necessary authorization will result in its destruction.<sup>35</sup> In any seizure of bodily fluids, the extraction must be reasonable and conducted by medical personnel.

Absent from this provision is language addressing potential self-incrimination questions associated with production of bodily fluids.<sup>36</sup> The intent of the drafters is apparently centered on treatment of the issue as primarily a search and seizure problem. But as noted earlier, counsel must, in any bodily evidence fact pattern, go through an analysis of potential self-incrimination applications. Foresight might avoid the Article 31(a) self-incrimination problems. If the authorities treat the production of the fluids as a fourth amendment problem and not simply issue "orders" or requests" to the individual for the fluids, they will be in a better position to argue the inapplicability of the Article 31(a) line of cases touching on bodily fluids.<sup>37</sup>

**Other Intrusive Searches: Rule 312(e)**

If law enforcement officials wish to obtain or locate items not in the scope of the provisions governing visual examination of the body or intrusion into the body cavities, according to 312(e) the intrusion must (1) be based upon a search warrant or authorization; (2) be conducted in a reasonable fashion by medical personnel; and (3) not endanger the health of the individual being searched. Compelling bodily elimination of the object or forcing ingestion

of tracer substances constitutes a search within the rule.<sup>38</sup> Simply allowing nature to run its course would apparently not raise any serious fourth amendment problems.<sup>39</sup> Note that these intrusive searches *may not* be conducted upon individuals not suspects or accuseds.

This portion of the rule should cover those situations generally classified in the civilian line of cases as surgical intrusions to obtain evidence. Those cases generally apply a balancing test of all the interests involved; that is, the government's need for the evidence, the individual's privacy and health, and the proposed procedures.<sup>40</sup>

A judicial template in this area which may be helpful is *United States v. Crowder*.<sup>41</sup> Police, anxious to retrieve two bullets (in wrist and thigh) from a suspected murderer, sought assistance from a United States Attorney who applied for and obtained judicial approval to have the evidence surgically removed. The application was unsuccessfully opposed by the defendant who also unsuccessfully sought a writ of prohibition. The bullets were surgically removed and later offered into evidence. The Circuit Court for the District of Columbia sustained the conviction; the court seemed to be impressed with: (1) the fact that the only way to get this relevant evidence was through surgical removal; (2) the defendant was offered an opportunity to block the application for the surgery; (3) he was offered an opportunity for appellate review of the order to remove the bullets; and (4) the surgery was minor and was conducted by skilled doctors who took all of the necessary precautions.

Under Rule 312, judicial authorizations to search for or seize bodily evidence are not required. But in the situation where surgical intrusions are required, the *Crowder* procedures serve as a good example of a "reasonable" surgical intrusion.

**Intrusions for Valid Medical Purposes: Rule 312(f)**

Serving as a relief valve for any bodily evidence issue, whether a mere visual examina-

tion or a surgical intrusion, is the rule's provision which states:

Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure. . . ." <sup>42</sup>

Implicit in this is a requirement to examine the actual purpose and method of the examination. Simply labelling a search or seizure as a valid medical examination probably will not be sufficient. What about taking blood or urine samples for the medical purpose of detecting drug usage? Again, there may not be a fourth amendment problem but Article 31(a) lingers on and must be considered. <sup>43</sup>

Turning briefly to the problem presented in the introduction, may the CID properly seize the two bullets, the blood sample, and the heroin? Yes, on all three counts. Assuming that the three suspects refuse to voluntarily provide the evidence, the CID have several options but the surest method is to proceed under Rule 312 and obtain a search authorization for each item. <sup>44</sup> That assumes of course that probable cause may be established for each requested search; if it does not exist, for example, with regard to the heroin, other provisions of Rule 312 might support a visual examination and subsequent seizure under 312(b) <sup>45</sup> or 312(f). <sup>46</sup>

### Due Process Considerations

The third and final consideration in the area of bodily evidence is the pervasive theme of "due process". This is especially important in bodily evidence questions where the individual's right to be secure in his or her person is paramount. Courts are forever sensitive to the *Rochin* "shock the conscience" test <sup>47</sup> and the possibility that the invasion, however, slight, might constitute an unwarranted violation of one's dignity and privacy.

Rule 312 senses the delicate and personal nature of bodily evidence questions and so requires "reasonable" execution of the search or

the seizure and in some instances mandates that medical personnel effect the seizure. The rule certainly does not abrogate any due process questions; a properly authorized intrusion may nonetheless be prohibited on due process grounds. For example, the authorities may have proper authorization to seize drugs secreted in a body cavity but in effecting the seizure "shock the conscience" in the manner in which they retrieve the contraband. <sup>48</sup>

### Conclusion

Rule 312 makes a bold step in the law of bodily evidence. For the first time in military practice, many of the bodily evidence rules are now codified. Codification notwithstanding, the important issues of self-incrimination and due process remain open and must be considered in conjunction with the fourth amendment issues in Rule 312. Treating the bodily evidence problem as a fourth amendment issue from the outset and using extreme care in executing the searches or seizures will probably avoid both the self-incrimination and due process issues.

### Footnotes

<sup>1</sup> 1980 Military Rules of Evidence revise Chapter 27 of the Manual for Courts-Martial. They are effective on 1 September 1980 [hereinafter cited as Mil. R. Evid.].

<sup>2</sup> See *Schmerber v. California*, 384 U.S. 757 (1966). The majority specifically rejected the argument that a right to privacy existed in the 5th Amendment. See generally Eckhardt, *Intrusions Into the Body*, 52 Mil. L. Rev. 141 (1971), for a very good discussion of comparisons in civilian military practice. For a further discussion on the civilian practice see 25 ALR2d 1407.

<sup>3</sup> See e.g., *United States v. Martin*, \_\_\_ M.J. \_\_\_ (N.C.M.R. 1979) (teeth impressions); *United States v. Cain*, 5 M.J. 844 (A.C.M.R. 1978) (accused ordered to exhibit teeth during trial); *United States v. Culver*, 44 C.M.R. 564 (A.F.C.M.R. 1971) (teeth); *United States v. Johnson*, 39 C.M.R. 745 (A.B.R. 1968) (hair sample); *United States v. Pyburn*, 47 C.M.R. 896 (A.F.C.M.R. 1973) (pubic hair sample). In seizing these samples the authorities may use reasonable force. See also *United States v. Rosato*, 3 C.M.A. 143, 11 C.M.R. 143 (1943) (accused or suspect may be required to grow or trim a beard or try on a garment or submit to fingerprinting, placing foot in tracks or exhibiting scars).

<sup>4</sup> See e.g., *United States v. Ruiz*, 23 C.M.A. 181, 48 C.M.R. 797 (C.M.A. 1974) (order to urinate violated suspect's Article 31(a) right not to give incriminating evidence); *United States v. Musquire*, 9 C.M.A. 67, 25 C.M.R. 329 (1958) (giving blood sample would be "statement"); *United States v. Jordon*, 7 C.M.A. 452, 22 C.M.R. 242 (1957) (order to urinate was illegal because it was an attempt to obtain a specimen by force). Cf. *United States v. Williamson*, 4 C.M.A. 320, 15 C.M.R. 320 (1954) (catherization to obtain urine sample not violative of due process, fourth amendment, or self-incrimination because of passive nature of taking; unconscious suspect was not required to actively participate).

<sup>5</sup> See e.g., *United States v. Whipple*, 4 M.J. 773 (C.G.C.M.R. 1978) (handing over drugs was "statement").

<sup>6</sup> See e.g., *United States v. Woods*, 3 M.J. 645 (N.C.M.R. 1977), *pet. denied*, 3 M.J. 264 (C.M.A. 1977) (Suspect swallowed packet of heroin. He was placed in holding cell where eight days later nature took its course and the evidence was recovered).

<sup>7</sup> The question of admissibility of such would turn on the same arguments relied upon for litigating the voluntariness of a verbal utterance.

<sup>8</sup> This route was implicitly suggested in *Ruiz*, *supra*, note 4. The Court noted that the Government's interest in controlling the drug problem could be protected by "assuring [the suspect's] voluntary cooperation or separating him from the service without penalty." Retaining the individual and placing him in a drug rehabilitation program would not constitute a criminal consequence.

<sup>9</sup> Rule 305, Mil. R. Evid. discusses the rights warnings requirements.

<sup>10</sup> Article 31(b), U.C.M.J.

<sup>11</sup> See notes 4, 8, *supra*.

<sup>12</sup> See e.g., *In re Melvin*, 550 F.2d 674 (1st Cir. 1977) (suspect may be compelled to stand in lineup). See also *United States v. Bridges*, 499 F.2d 179 (7th Cir. 1974), cert. den. 419 U.S. 1010 (1974) (swabbing hands to determine presence of explosives not violative of fifth or fourth amendment); *United States v. Holland*, 378 F. Supp. 144 (D.C. Pa. 1974) (examination of suspect's mouth to see if tooth was missing not violative of fifth or fourth amendment); *United States v. Richardson*, 388 F.2d 842 (6th Cir. 1968) (No search when suspect's hands examined for tracer powder); *United States v. D'Amico*, 408 F.2d 331 (2d Cir. 1969) (clipping hair from suspect's body). In these situations the "intrusion" is slight.

<sup>13</sup> See *People v. Scott*, 23 CrL 2251 (June 21, 1978) (balancing test used to measure reasonableness of body intrusion—massaging the prostate gland to obtain a semen sample). See note 48 *infra*.

<sup>14</sup> Paragraph 152 of the *Manual* currently provides:

"... [B]ut a search which involves an intrusion into [a person's] body, as by taking a sample of his blood for chemical analysis, may be conducted under this rule only where there is a clear indication that evidence of crime will be found, there is reason to believe that delay will threaten the destruction of the evidence, and the method of conducting the search is reasonable."

<sup>15</sup> Rule 312(b)(1). The examination may be made subject to the inspection in accordance with Rule 314(e).

<sup>16</sup> Rule 313, Mil. R. Evid. 313.

<sup>17</sup> Rules 314(b) (border searches), 314(c) (searches upon entry to United States installations, aircraft, and vessels abroad).

<sup>18</sup> Mil. R. Evid. 314(h) (searches within jails, confinement facilities, or similar facilities).

<sup>19</sup> Mil. R. Evid. 314(g) (searches incident to lawful apprehension).

<sup>20</sup> Mil. R. Evid. 314(i) (emergency searches to save life or for related purposes).

<sup>21</sup> Mil. R. Evid. 315 (probable cause searches).

<sup>22</sup> See e.g., *United States v. Himmelwright*, 551 F.2d 991 (5th Cir. 1977) (visual examination of suspect's vagina by customs inspectress netted 105 grams of cocaine); *Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975) (visual rectal inspections conducted on service members).

<sup>23</sup> See e.g., *United States v. Holtz*, 479 F.2d 89 (9th Cir. 1973). See Rule 314(c).

<sup>24</sup> *Bell v. Wolfish*, \_\_\_ U.S. \_\_\_ 60 L.Ed.2d 447 (1979). Prisoners, after contact visits, were subject to strip searches. They were required to spread their buttocks for visual inspections. Males were required to lift their genitals and vaginal cavities of female inmates were also examined. The Supreme Court balanced the interests involved and found the procedure to be reasonable. Justice Marshall dissented noting that the searches represented one of the most grievous offenses against personal dignity and common decency.

<sup>25</sup> See notes 16-21, *supra*, and accompanying text. For example, the MP's apprehending a suspect notice him attempting to swallow suspected contraband or evidence. They may immediately, but reasonably, force him to open his mouth and may then extract the object. If the MP's tell the suspect to take it out himself and give it to them, is there an Article 31 problem? Possibly. If the individual is a suspect and the MP's simply state, without effecting a lawful apprehension, "give us the drugs you've got in your mouth," there is a problem. That would amount to an "interrogation". The military courts have generally applied the Article 31 protections to situations where

a lawful search or seizure was not effected first and the suspect was simply told, or requested, to hand over the contraband. *See e.g.*, *United States v. Kinane*, 1 M.J. 309, 311, n. 1 (C.M.A. 1976); *United States v. Hay*, 3 M.J. 654 (A.C.M.R. 1977).

<sup>25</sup> Compare with nonconsensual intrusions in Rule 312 (c)(1) and (2). *See* notes 27-33 *infra*, and accompanying text.

<sup>27</sup> *Mil. R. Evid.* 312(c)(1).

<sup>28</sup> *Mil. R. Evid.* 312(c)(2).

<sup>29</sup> The rule unfortunately does not define "appropriate medical qualifications" but rather leaves that task to the Secretaries of the various services. In the absence of such direction, common sense should control: The more sensitive or delicate the intrusion, the more medical training the individual should possess.

<sup>30</sup> When seeking authorization under Rule 315, the authorities must be aware of existing case law which requires independent and neutral "magistrates" (*United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979) and an oath or affirmation (*United States v. Fimmano*, 8 M.J. 197 (C.M.A. 1980)).

<sup>31</sup> *See* note 29, *supra*.

<sup>32</sup> *Id.*

<sup>33</sup> This provision apparently follows the prevailing position that the Government's interests in the security of confinement facilities carries special weight and consideration. *See generally*, *Bell v. Wolfish*, \_\_\_ U.S. \_\_\_, \_\_\_ U.S. \_\_\_, 60 L.Ed.2d 447 (1979), discussed at note 24, *supra*. *See also* *Mil. R. Evid.* 314(h).

<sup>34</sup> The standard to be applied for a consensual "seizure" of bodily fluids should follow the standard to be used for any consent search.

<sup>35</sup> Note that this language tracts with the language in the 1969 *Manual* provision at paragraph 152. *See* note 14 *supra*.

<sup>36</sup> *See* notes 4-8 *supra*, and accompanying text.

<sup>37</sup> Compelling bodily elimination clearly raises self-incrimination problems. *See United States v. McClung*, 11 C.M.A. 754, 29 C.M.R. 570 (suspect's urine obtained after forcing 8 to 10 glasses of water into his system). If however, the authorities proceed under fourth amendment (Rule 312) procedures, arguably they can force the individual to expel the sought evidence as long as due process standards are met. *See* notes 47, 48 *infra*, and accompanying text.

<sup>38</sup> Key here would be an analysis of the facts to determine if the evidence was obtained by a lawful search or seizure or by an "interrogation." *See* note 25 *supra*.

<sup>39</sup> *See United States v. Woods*, 3 M.J. 645 (N.C.M.R. 1977), pet. denied 3 M.J. 264 (C.M.A. 1977) where officials placed accused in holding cell, pursuant to apprehension, for eight days. Nature ran its course and packet of heroin, which accused had swallowed upon apprehension, was recovered. The court cited a case involving similar facts, *Venner v. State*, 30 Md. App. 599, 354 A.2d 483 (1976), aff'd, 279 Md. 47, 367 A.2d 949 (1977), in rejecting arguments that a self-incrimination right was violated or that a bodily intrusion had occurred. Rather, it was abandoned property—the accused had shown no interest in retaining possession of either his stool or its contents. A different result would occur under Rule 312, and possibly under due process standards, if the officials had compelled the expulsion of the contraband without basing their actions on valid fourth amendment principles. *See e.g.*, *Rochin v. California*, 342 U.S. 165 (1952) (compelled vomiting to recover drugs). *See also United States v. McClung*, 11 C.M.A. 754, 29 C.M.R. 570 (1960) (urine sample was involuntarily obtained after forcing suspect to drink 8 to 10 glasses of water).

<sup>40</sup> *See generally*, *Smith, Search and Seizure: Compelled Surgical Intrusions?* 27 *Baylor L. Rev.* 305 (1975).

<sup>41</sup> 543 F.2d 312 (D.C. Cir. 1976), cert. denied, 429 U.S. 1062 (1977). This case is discussed at *Minton, Criminal Procedure—Surgical Removal of Evidence*, 43 *Mo. L. Rev.* 133 (1978).

<sup>42</sup> *Mil. R. Evid.* 312(f). *See United States v. Miller*, 15 C.M.A. 320, 35 C.M.R. 292 (1965) where court allowed evidence of alcohol content in blood taken from unconscious suspect for purely diagnostic purposes. Absent was any "nexus" between the doctor and enforcement agents or the suspect's superiors who may have been interested in the results.

<sup>43</sup> This is particularly true where the "diagnostic" sample is being taken from a "suspect" at the request of law enforcement officers. If a random sampling program is underway and the individual is not a suspect, then fewer problems exist. If during the testing, an individual indicates that the test will turn out positive, he becomes a suspect and the *Ruiz* problem looms.

<sup>44</sup> *See e.g.*, 312(b)(2) (involuntary visual inspection of body, including body cavities, pursuant to probable cause search); Rule 312(c)(2) (nonconsensual search of rectum based upon probable cause).

<sup>45</sup> The visual, nonconsensual, inspection of the body would of have to based upon one of the stated procedures in Rule 312(b). *See* notes 16-21, *supra* and accompanying text.

<sup>46</sup> For example, even as the CID agent is speaking, medical personnel concerned over the medical well-being of the suspects may be taking blood samples and giving them valid medical examinations.



<sup>47</sup> *Rochin v. California*, 342 U.S. 165 (1952).

<sup>48</sup> For example, in *People v. Scott*, 23 CrL 2253 (June 21, 1978) the California Supreme court balanced the interests of the Government and the suspect and considered the general nature of the intrusion. It concluded that a court-ordered bodily intrusion, which consisted of the suspect's prostrate gland being mas-

saged in order to obtain a semen sample, was as extreme as the regurgitation in *Rochin*. But in *Darland v. State*, 25 CrL 2377 (Aug 1, 1979) the court found no due process violation where a police officer obtained a urine sample from a DWI suspect by holding a styrofoam cup in front of him while he was urinating.

## Eyewitness Identification Under The Military Rules of Evidence

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The issue of eyewitness identification has always included two components: right to counsel and due process. Prior to adoption of the Military Rules of Evidence<sup>1</sup> the military practitioner had no single source of authority pertaining to these two diverse concepts; this void has now been filled by rule 321.<sup>2</sup> Additionally, the rule sets out significant procedural changes with regard to the admission of identification evidence.

### Introduction of Eyewitness Testimony

Under the hearsay definition encompassed in former Manual Paragraph 139a, in-court reference to extrajudicial declarations of identity were considered to be hearsay and therefore generally inadmissible.<sup>3</sup> To qualify for admission such out-of-court identifications had to fall under either a recognized hearsay exception<sup>4</sup> or come within the special bolstering provisions of Paragraph 153a, MCM. That paragraph permitted the admission of such evidence for the limited purpose of corroborating courtroom testimony, provided the witness first made an in-court identification of the accused.<sup>5</sup>

Under the Military Rules of Evidence testimony concerning an out-of-court identification remains, as a general rule, hearsay.<sup>6</sup> Admission of such evidence must therefore be based on a recognized hearsay exception listed in rules 803<sup>7</sup> or 804<sup>8</sup> or some other evidentiary provision.

The Military rules have in rule 801(d)(1)(C)<sup>9</sup> adopted a provision which significantly

expands the opportunity to introduce eyewitness testimony.<sup>10</sup> It provides that a statement of identification, whether given in court or out of court, is *not hearsay* when the identifying witness is present in court and subject to cross-examination.<sup>11</sup> Under this rule an eyewitness may refer to an extrajudicial identification even though that identification does not qualify as a traditional hearsay exception and notwithstanding the fact that an in-court identification is not first made.

The second sentence of rule 321<sup>12</sup> is the vehicle for introducing most evidence admissible under rule 801. It provides that a person making an out-of-court identification, as well as anyone observing it, may testify concerning that matter. This provision is applicable to those situations where a victim, or any eyewitness, identifies a criminal shortly after an incident but cannot later testify at trial that the accused is the previously identified criminal. Under such circumstances it is incumbent upon the prosecution to call as a witness a third party observer to the original identification to testify that the person identified by the victim at the former proceeding is in fact the accused. The second sentence of rule 321<sup>13</sup> allows for the introduction of such testimony, but contrary positions can be taken as to how this provision should be interpreted. One view is that linkage between a pretrial identification and the accused can be established by simply presenting the testimony of a third party observer to the pre-trial identification. The clear language of the rule and abundant judicial authority supports this posi-